Bank of America Higher Standards

CCB/CP Compliance Support
NC4-105-02-57
4161 Piedmont Parkway
Greensboro, NC 27410-8110

Tel 336-805-2842
Fax 336-805-2010

January 29, 2004

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Via Electronic Submission: regs.comments@federalreserve.gov

Re: Docket No. R-1167, Regulation Z
Docket No. R-1168; Regulation B
Docket No. R-1169; Regulation E
Docket No. R-1170; Regulation M
Docket No. R-1171; Regulation DD

Dear Ladies and Gentlemen:

Introduction.

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on the proposed rules to establish more uniform standards for providing disclosures under five of the consumer protection regulations of the Board of Governors of the Federal Reserve System ("the Board"). Bank of America is one of the world's leading financial services companies, and is the sole shareholder of Bank of America, N.A., one of the largest banks in the United States. Through the nation's largest financial services network, Bank of America provides financial products and services to 30 million households and two million businesses, and also provides international corporate financial services for clients around the world.

Detail Not Necessary to Clear and Conspicuous Standard.
The Board is proposing to amend Regulations Z, B, E, M, and DD and their respective commentaries ("Proposed Rules") to provide more detail around the "clear and conspicuous" standard. Bank of America strongly opposes adoption of the Proposed Rules. Although Bank of America agrees that it is appropriate to require financial institutions to provide disclosures required by law in a manner likely to be seen and understood by consumers, the use of the Regulation P "clear and conspicuous" standard and corresponding examples is inappropriate.

First, the requirement in Regulation P applies to a single set of disclosures, which is almost always provided in a written document or as a link on the Internet. In contrast, the Proposed

Rules would impact a much wider variety of disclosures, including disclosures to be provided with advertising, at the time of application or account opening, with periodic statements, or as a change of terms. The disclosures covered by the Proposed Rules are also delivered in many different ways that may include billboards, printed materials, radio, etc.

Second, even though Regulation P addresses a much simpler set of circumstances, the Board and other federal banking agencies have acknowledged that improvements to the privacy notices provided by financial institutions are needed to ensure that the notices are more understandable and useful to consumers. Therefore, we believe it would be inappropriate to impose a new standard for disclosures that is based on a standard that has been universally criticized.

The proposal does not cite any specific reasons to believe that current disclosures are inadequate. Currently, the regulations and the disclosures made pursuant to the regulations are tailored to the particular circumstances and types of transactions to which they pertain. Thus, the timing, format and context of checking account disclosures, mortgage loan disclosures, credit card disclosures and ECOA adverse action disclosures are dramatically different from one another – and for good reason. The proposal to change the standards applicable to all classes of disclosures would necessitate review, revision, re-printing, distribution and re-training around dozens, if not hundreds, of documents currently in use at Bank of America. In addition, all brochures, advertisements, billboards and websites would have to be reviewed and replaced. The burden in terms of time and expense will be substantial, yet there is little or no showing that the effort would be justified by the need to redress a harm to consumers.

While Bank of America appreciates the Board's efforts to provide examples to assist in understanding how to make disclosures clear, Bank of America is concerned that the issue of "reasonably understandable" is likely to be the subject of litigation. The examples provided in the Proposed Rules are modeled after the examples in Regulation P and attempt to demonstrate the proposed "clear and conspicuous" standard. Unfortunately, the Board has recognized itself that many of the clear and conspicuous examples provided in Regulation P are ambiguous and subject to interpretation. Bank of America believes the imprecision of the examples would invite courts to second-guess the quality of the information provided. This may place a financial institution in the difficult situation of attempting to present complicated, technical information in such a manner that would be consistent with the examples but that a court could later determine that a more clear explanation was possible. The mere fact that a litigant or court believes that Bank of America might have rephrased a disclosure in a clearer manner (by a subjective standard) will subject the bank to potential liability in individual and class action civil litigation.

One example of this difficulty is where creditors are instructed to use "everyday words" and "avoid legal and highly technical business terminology" in its disclosures. However, other regulations require financial institutions to use specific terminology and certain defined terms in its disclosures. For example, Regulation Z requires use of such terms as "annual percentage rate" and "finance charge." These terms have highly technical business and legal meaning. Therefore, when a financial institution uses this and other required terminology in its disclosures, it potentially will be in violation of the Proposed Rules that mandate use of "everyday words" in lieu of "legal and highly technical business terminology." Simplifying highly technical or legally exact language eliminates precision, which can open the "simple" language to other, unintended interpretations, creating the sort of ambiguity that promotes litigation. The lack of precision and the introduction of ambiguity would defeat the "clear" purpose of the regulation.

Most significantly, because of the imprecise language (as explained above), financial institutions will be exposed to additional civil litigation risk. While there is no private right of action for a

Regulation P violation, the regulations affected by the Proposed Rules do provide for civil liability. Due to the imprecise language, the question of whether or not there is a violation may need to be decided by a jury, which reduces the likelihood that the case can be resolved at the pre-trial stage. This uncertainty then becomes both an incentive to class action litigants and a lever to extract large settlements in order to avoid the expense and uncertainty of a trial. Therefore, the risks and consequences of failing to comply with the requirements are very different under Regulation P and the regulations affected by the Proposed Rules.

In addition to the cost and time required to review and possibly revise every disclosure affected by the Proposed Rules, the end result after any possible revision will not necessarily result in disclosures that are more easily understood by the consumer. For example, in some cases required disclosures are imbedded in the contract language governing a credit, as is often the case for open-end disclosures. In these cases, highlighting certain words and not others could be very confusing to consumers. Also, increasing type size for Regulation B notices could force an adverse action letter to more than one page, obscuring the notice from the attention of the consumer.

Use of Examples Designed to Call Attention.
Bank of America opposes the inclusion in the Proposed Rules of examples designed to illustrate compliance with the proposed "clear and conspicuous" standard. The proposed examples could create confusion, invite litigation and require financial institutions to make unnecessary changes to programs, forms, systems and processing equipment. The costs incurred to make these changes will be significant. This requirement involves multiple disclosures that cover written documents, radio, television, on-line ads, and parts of large documents to name a few. In credit card products alone, millions of new account initial disclosures will be impacted, as well as costly changes to electronic terminals that will be necessary to meet Regulation E requirements and the new changes under the Proposed Rules. Requiring this level of detail, such as font size, spacing and margin settings, in the commentary as opposed to a general standard, such as "easy to read," will encourage litigation and invite courts to interpret these guidelines as requirements.

Other Information.
The Board proposes that the "clear and conspicuous" standard does not prohibit adding to the required disclosures such items as contractual provisions, explanations of contract terms, state disclosures, or sending promotional material with the required disclosures; however, the Board has proposed that the presence of this other information may be a factor in determining whether the standard is met. This seems to suggest that all disclosures subject to the clear and conspicuous standard should be segregated from other required information. Not only would the initial cost to segregate the disclosures be substantial, but also, the cost to maintain a significant volume of single disclosures would be quite significant. In addition, receiving segregated disclosures is likely to cause confusion on the part of consumers as they will not know which information the disclosure pertains to, which information is more important, and which information should be the point of focus.

Additional Proposed Rules to Amend Regulation Z.
The Board proposes using a legend or description of the code or symbol on the disclosure statement whenever codes or symbols are used. If this proposal is applied to advertising, it will result in a significant burden and expense to include the legend or description of the code or symbol in all existing advertisements and disclosures. In addition, Bank of America believes that the deletion of guidance in Regulation Z regarding "Schumer Box" disclosures and how this pertains to electronic disclosures will create confusion for financial institutions.

Regulatory Burden.
The Board solicited comment on its view that there would be no increase in burden caused by complying with the proposed "clear and conspicuous" standard. Although it is difficult to precisely estimate the cost of compliance, Bank of America estimates that the burden, in both time and money, would be significant. Each financial institution would be required to spend an enormous amount of time reviewing disclosures, and the time that it would take to review hundreds of disclosures would be very costly. Every financial institution would be required to incur disclosure design costs to meet the proposed "clear and conspicuous" standard. After initial compliance with disclosure design, it would be necessary to train employees on how to comply with the new standard. And, this is not just a question of re-designing, re-printing and distributing paper forms. Programming changes to multiple bank and non-bank systems will be a lengthy and costly process to implement. For example, changes to disclosures used in the indirect lending arena would require significant time and expense to reprogram dealers' systems. Of greater concern, the Proposed Rules invite courts to second-guess the quality of our information and that substantially increases the likelihood of unnecessary litigation costs and associated regulatory burden to financial institutions.

We believe that the current standards are sufficient to deal with any potential problems; however, if the Board has identified particular disclosures that it determines do not meet the current standards in the affected regulations, it can and should use its existing examination and enforcement powers to focus on and resolve those problems.

Request for Information Regarding Debt Cancellation and Debt Suspension Agreements Under Regulation Z.
Bank of America urges the Board to harmonize any new regulations dealing with debt cancellation and debt suspension with the Office of the Comptroller of the Currency regulations that provide substantive consumer protections and disclosure requirements for national bank customers. With regard to debt cancellation and debt suspension agreements, the mandate of the Truth in Lending Act is to serve as a disclosure framework and is not meant to create substantive restrictions or permissible terms of agreements between informed and willing parties. Bank of America urges the Board to preserve maximum flexibility for credit protection programs that may be developed in the future.

With regard to the six specific bullet point questions that were raised, Bank of America has the following comments:

1. What are the similarities and differences among credit insurance, debt cancellation coverage, and debt suspension coverage, in the case of both closed-end and open-end credit?

- Credit insurance makes the consumer's monthly payment, debt cancellation coverage forgives or cancels the monthly payment, and debt suspension coverage delays the monthly payment for some defined period of time.
- The overriding similarity among credit insurance, debt cancellation and debt suspension agreements is that all are an optional means of protecting a borrower's credit standing and ability to maintain a current status on his obligations by relieving pressure in times of hardship or distress. Credit insurance specifically involves a third-party commitment by an entity outside the debtor/creditor relationship to pay a portion (or all) of the loan balance upon occurrence of a specified event. In contrast, debt cancellation or debt suspension coverage is a simple contractual arrangement between the two parties to a credit transaction not involving an outside party. Debt cancellation or suspension arrangements may cover risk factors similar to those traditionally covered by credit insurance or they may cover other

events that may be of concern to the parties involved. Debt suspension coverage will alleviate the borrower's need to make monthly payments by suspending the obligation for the duration of the hardship or some other specified time period. Debt cancellation coverage involves the contractual forgiveness of all or a portion of the debt.

- Credit insurance and debt cancellation coverage both cover required payments. All products are priced based on the consumer's outstanding balance. Products are typically capped (e.g. maximum coverage $10,000) and have a pay-in-full feature upon death up to the maximum coverage.

2. With what types of closed-end and open-end credit are debt cancellation and debt suspension products sold? Do creditors typically package multiple types of coverage (e.g., disability and divorce), or sell them separately? Do creditors typically sell the products at, or after, consummation (for closed-end credit) or account opening (for open-end credit plans)?

- In the marketplace, debt cancellation and suspension products are becoming available across the entire spectrum of credit products. In the direct loan context, whether open end or closed end, the product offering will most likely take place prior to loan closing, although they can certainly occur at any time before or after consummation of the transaction. In the credit card context, because many accounts are opened without direct contact between the lender and the borrower (for example, a "take one" credit card application) there is a higher incidence of sales after an account has been opened.
- For credit card, we currently only sell debt cancellation coverage. We have existing customers who previously enrolled in credit insurance who maintain that coverage.
- For credit card, our debt cancellation product covers multiple types of hardships: unemployment, disability and family leave.
- Currently, credit card offers debt cancellation coverage at the time of account opening. In 2004, we are planning to solicit existing consumers.

3. What disclosures are made with the sale of a product or upon conversion from one product to another, whether required by TILA or other laws? How are monthly or other periodic fees disclosed to consumers?

- Our disclosures are designed to comply with both Truth in Lending and the applicable OCC Regulation (12 CFR Part 37). For debt cancellation coverage on closed end loans, the monthly fee is disclosed both as a dollar amount and as a percentage of the monthly principal and interest payment; in addition, the total anticipated fee over the life of a loan is disclosed.
- For conversions, we provide disclosures in accordance with both Regulation Z, 12 CRF § 226.9 and the OCC's Guidelines on Debt Cancellation.
- For credit cards, fees are disclosed in the solicitation materials, and disclosed at product opening. The fee assessment appears on the customer's periodic statement.

4. Under Regulation Z, fees for credit protection programs written in connection with a credit transaction are finance charges but some fees may be excluded from the disclosed finance charge if required disclosures are made and the consumer affirmatively elects the optional coverage in writing. See §§ 226.4(b)(7) and (10), 4(d)(1) and (3). Is there a need for guidance concerning the applicability of those provisions to certain types of coverage now available? Are the required disclosures adequate for all types of products subject to § 4(d)(1) or 4(d)(3)?

- The existing disclosure works well in that it is similar to the familiar credit insurance disclosure and requires the basic information regarding the cost of the product and its voluntariness along with an indication of a borrower's desire to purchase the product. (Note

that similar concepts are carried over into the OCC Regulation (12 CFR Part 357)). The Board should consider expanding excludability from the finance charge (with disclosure, of course) for any debt cancellation coverage that creditors and borrowers may agree upon without restricting the universe of risks to life, health, income or collateral. This would preserve flexibility and promote marketplace innovation.

5. Under TILA, a credit card issuer must notify a consumer before changing the consumer's credit insurance provider. See 15 U.S.C. 1637(g); 12 CFR § 226.9(f). Card issuers that intend to change credit insurance providers need only notify consumers that they may opt out of the new coverage. Should the Board interpret or amend § 226.9(f) to address conversions from credit insurance to debt cancellation or debt suspension agreements? If so, is there a need to address conversions other than for credit card accounts?

- Current credit card rules related to changing credit insurance carriers address the concern that one carrier might be more or less solvent and, therefore, more or less capable of paying claims for the benefit of the borrower. By contrast, debt cancellation or suspension agreements carry no comparable solvency issue for the borrower because the creditor, by direct contract with the borrower, forgoes a right that it would otherwise enjoy, independent of any third party's ability to make a benefit payment. In the absence of similar concerns, if the cost to the borrower for similar protections is not increased, no additional regulation is required.
- We believe Section 226.9(f) of Regulation Z should be expanded to cover conversion from credit insurance to debt cancellation/suspension.

6. OCC regulations for national bank sales of debt cancellation and suspension agreements require a customer's affirmative election of the product. If the Board interprets or amends § 226.9(f) to address conversions from credit insurance to debt cancellation or debt suspension agreements, what additional guidance would card issuers need, if any, to comply with both rules?

- We do not believe it is necessary to modify Regulation Z to specifically address a disclosure scheme for modification for credit insurance to debt cancellation or debt suspension agreements.
- We follow the OCC regulations regarding affirmative election. Any guidance on conversions would have to address the affirmative election requirement versus the current notice requirements of Section 226.9(f), which do not require an affirmative election.

We would be happy to discuss our views in greater detail, or to discuss any new ideas that the Board wishes to pursue. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact Denise Kugler at (336) 805-2842.

Sincerely,

Denise E. Kugler
Senior Vice President
Compliance Risk Management